IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

RFA.No. 468 of 2006()

OS.298/2004 of PRINCIPAL SUB COURT,ERNAKULAM
.....

APPELLANT/6TH DEFENDANT

MARY JEMMA,
W/O.BABY PATHIALA ALIAS JOSE -
AUGUSTINE MERCELINE, PATHIALA HOUSE,
PEOPLE'S ROAD, VYTTILA P.O., KOCHI-19.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS: PLAINTIFFS AND DEFENDANTS
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1. STEPHEN PANTHIALA,
S/O.LATE MERCELINE PATHIALA,
PATHIALA HOUSE, PEOPLES ROAD,
THYKOODAM, VYTTILA P.O., KOCHI-19.

2. MRS.MARYKKUNJU URUMESE,
W/O.URUMESE, AZHINAKKAL HOUSE,
ERAMALLOOR-688 537.

3. MRS.OMANA BOSCO,
W/O.LATE BOSCO PATHIALA,
PATHIALA HOUSE, PEOPLES ROAD,
VYTTILA P.O., THYKOODAM, COCHIN-19.

4. JEESON BOSCO,
S/O.BOSCO PATHIALA, PATHIALA HOUSE,
PEOPLES ROAD, VYTTILA P.O., THYKOODAM,
KOCHI-19.

5. MR.STANLEY PATHIALA,
S/O.MERCELINE PATHIALA, PATHIALA HOUSE,
PEOPLES ROAD, VYTTILA P.O.,
THYKOODAM, COCHIN-19.

6. MRS.GRACY ABRAHAM,
W/O.ABRAHAM, HOUSE NO.433/A,
SECTOR 9 A, SAKET NAGAR, BHOPAL 462 024,
MADHYA PRADESH.

7. BABY PATHIALA ALIAS JOSE AUGUSTINE
MERCELINE, S/O.MERCELINE PATHIALA,
PATHIALA HOUSE, PEOPLES ROAD, THYKOODAM,
COCHIN-19.

8. JOSHY PATHIALA,
S/O.MECELINE PATHIALA, PALAPARAMB HOUSE,
KADAVANTHARA, NEAR FIRE STATION,
MATHA NAGAR, KALOOR P.O., KOCHI-17.

9. FR.DOMINIC,
S/O.MERCELINE PATHIALA,
DIRECTOR, KARUNA, MARADU P.O.,
KOCHI-682 304.

10. SOBIN, S/O.BABY PATHIALA ALIAS
JOSE AUGUSTINE - MERCELINE,
PATHIALA HOUSE, PEOPLES ROAD,
VYTTILA P.O., THYKOODAM, KOCHI-19.

BY ADV. SRI.DILIP J. AKKARA
SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN
SRI.P.T.GIRIJAN
SRI.NELSON J.MANAYIL
SMT.MINI.V.A.,ADV.COMMR.

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. NO. 3846/2006 & 1853/2007 IN R.F.A. 468/2006

// DISMISSED //

29TH NOVEMBER, 2007.

SD/-
P.R. RAMAN, JUDGE.
SD/-
V.K. MOHANAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

KNC/

P.R. RAMAN & V. K. MOHANAN, JJ.

R.F.A. 468 OF 2006

DATED THIS, THE 29TH DAY OF NOVEMBER, 2007.

J U D G M E N T

Raman, J.

Appellant is the 6th defendant in O.S. 298/2004 on the file of the Principal Sub Court, Ernakulam.

2. The suit is one for partition and injunction. Admittedly, the appellant is not a sharer. So however, the appellant was arrayed as 6th defendant in the suit on the allegation that she trespassed into the property and constructed a building. The 6th defendant/appellant filed a written statement denying the allegation of trespass and contended that the property in her possession was purchased by her from the sharers by registered document and thus has become absolute owner thereof. It was also contended that she has got a right of way through the western side of her property to the Peoples Road. The court below passed a preliminary decree allotting shares. Since the appellant is not a sharer, it is not necessary to go into the details of the shares allotted to the parties. The relief of injunction, however, was declined as per the finding on Issue No.3. According to the appellant, she is an unnecessary party to the suit and

further, her contention for a right of way through the western property was not, however, decided by the court below.

3. The contention that the 6th defendant is an unnecessary party, according to us, is misconceived. Admittedly, an injunction was sought for against defendants 3, 6 and 7. If so, the 6th defendant cannot be said to be an unnecessary party. So however, that relief has been declined by the court below against which no appeal has been preferred. However, the question as to whether there is any right of way through the western portion of the appellant's property and whether the same is includable for partition has not been considered by the court below.

4. In this connection, we may notice that in I.A. 3551/2004 filed by the appellant and others, an injunction was granted in favour of the appellant herein which was the subject matter of challenge in F.A.O. 290/2005. After adverting to the contentions of the parties, this Court observed as follows:

> "After hearing learned counsel on both sides, we fell that it is sufficient in the interest of justice if we direct the trial court to dispose of the suit untrammeled by any of the observations contained in the order under appeal. xxxxxxxxx xxxxxx xxxxxx xxxxxxxx xxxxx We find that no serious prejudice will be caused to the appellant if, pending suit the respondents are allowed to use the pathway claimed by them especially in view of the close relationship

> between the parties. The balance of convenience, prima facie, is in favour of the respondents. But we make it clear that this is only for the purpose of interim application. The question whether there is any pathway and whether there is any agreement between the parties for using such pathway etc. are matters to be finally decided **after taking evidence and entire contentions raised by the learned counsel for the respondents will be considered by the trial court while disposing of the suit.** (emphasize given by us)

5. In view of the above direction issued by this Court, the court below ought to have raised an issue regarding as to whether the appellant herein has got a right of way through the western side of her property to the Peoples Road and if so, whether that pathway is includable for the purpose of partition. The court below shall necessarily frame an issue on the same.

The appeal is thus allowed by way of remand for the limited purpose of raising an issue on the claim made by the appellant herein and to answer the same based on the materials produced by the parties. The parties shall appear before the court below on 3.1.2008.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-